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IN THE

# Supreme Court of the United States

October Term, 1986

DONALD P. HODEL,
Secretary of the Interior; and

UNITED STATES DEPARTMENT OF THE INTERIOR,
*Petitioners,*

AMOCO PRODUCTION COMPANY; et al.,
*Petitioners,*

v.

PEOPLE OF
THE VILLAGE OF GAMBELL; et al.,
*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF AMICUS CURIAE OF NORTH SLOPE BOROUGH, et al. IN SUPPORT OF RESPONDENTS PEOPLE OF THE VILLAGE OF GAMBELL, et al.

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v.

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Respondents.

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On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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# BRIEF OF AMICI NORTH SLOPE BOROUGH, INUPIAT COMMUNITY OF THE ARCTIC SLOPE, UKPEAGVIK INUPIAT CORPORATION AND KODIAK AREA NATIVE ASSOCIATION IN SUPPORT OF RESPONDENTS PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

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## TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT.....5

ARGUMENT.....12

A. The Gambell I Opinion Establishes a Novel and Erroneous Departure from the Law of Aboriginal Rights, Violating Principles That Have Been Established for Two Centuries..14

B. Aboriginal Rights Are Cognizable in Sea-Ice Areas.....17

C. The Court of Appeals' Opinion Authorizes Broad and Unprincipled Extensions of Statutes Abrogating Indian Rights and Is Inconsistent with the Opinions of This Court.....24

1. There Is No Ambiguity in ANCSA; By Creating One, the Court of Appeals Wreaks Havoc with Rules Defining State Boundaries, and Contravenes Basic Principles of Federal Law.....27

2. ANCSA's Legislative History Provides No Support for the Extraordinary Decision of the Court of Appeals.....31

3. The Court of Appeals' Resolution of Perceived Ambiguities Against the Natives Violates Fundamental Principles of Federal Indian Law.....41

CONCLUSION.....47

## TABLE OF AUTHORITIES

Page

**Cases:**

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).....18

Bryan v. Itasca County, 426 U.S. 649 (1976).....24

Carter v. Hawaii, 200 U.S. 255 (1906).....19,20

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).....44

County of Oneida v. Oneida Indian Nation, 470 U.S. ___, 84 L. Ed. 2d 169, 179 (1985).....passim

Damon v. Hawaii, 194 U.S. 154 (1904).....20

Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984).....3,4, 11

Kaiser Aetna v. United States, 444 U.S. 164 (1979).....19

Kramer v. United States, 261 U.S. 219, (1923).....18

Menominee Tribe v. United States, 391 U.S. 404 (1968).....43

Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962).....18

Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835).....18

Morton v. Mancari, 417 U.S. 535 (1974).....16

Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487 (1964).....18

Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983).....44

United States v. Atlantic Richfield Company, 612 F.2d 1132 (9th Cir. 1980).....44

United States v. California, 332 U.S. 19 (1947).....21,28

United States v. Michegan, 471 F. Supp. 192 (W. D. Mich. 1979).....18

United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941).....17,18

Village of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984) (Gambell I).....passim

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).....18,19 23

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832).....15,18

**Statutes:**

Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq.....passim

Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 et seq.....passim

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).....27

Endangered Species Act, 16 U.S.C. §§ 1531-42.....19

Energy Policy and Conservation Act, 42 U.S.C. § 6202(5).....28

Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801 et seq.....19,22

Indian Reorganization Act, 25 U.S.C. §§ 461 et seq.....1

Marine Mammal Protection Act, 16 U.S.C. §§ 1367 et seq.....19

Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq.....21,22

Pacific Salmon Treaty Act of 1985, Pub. L. No. 99-5, 99 Stat. 7.....19

Submerged Lands Act, 43 U.S.C. §§ 1301 et seq.....21,22 28

43 U.S.C. § 391.....29

**Treaties:**

Treaty with Canada Concerning Pacific Salmon, done Jan. 28, 1985, T.I.A.S. No.___, art. XI.....19

**Congressional Materials:**

116 Cong. Rec. 24208.....33

117 Cong. Rec. at 38433.....33

117 Cong. Rec. at 36854.....34

117 Cong. Rec. at 36469.....35

124 Cong. Rec. S10, 106-07.....32

125 Cong. Rec. 44.....32

H.R. Rep. No. 92-523, 92d Cong., 1st Sess (1971), reprinted in [1971] U.S. Code Cong. & Ad. News 2192.....33

Hearings Before the House Subcomm. on Indian Affairs on H.R. 3100, H.R. 7039, and H.R. 7432 (1971).....34,38 39,45 46

Hearings Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971).....38

Hearings Before the Senate Comm. on Interior and Insular Affairs on S. 1830, 91st Cong., 1st Sess. (1969).....38

H. R. Rep. No. 92-523, 92d Cong. 1st Sess. (1971) reprinted in U.S. Code Cong. & Ad. News 2192 (1971).....33

H. R. Rep. No. 215, 83d Cong. 1st Sess., reprinted in U.S. Code Cong. & Ad. News 1385 (1953).....22

S. Rep. No. 133, 83d Cong., 1st Sess. 21 (1953).....22

S. Rep. No. 91-925, 91st Cong., 2d Sess. 46 (1970).....33

S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971), reprinted at 117 Cong. Rec. 38435, 38436 (1971)..33,35

S. Rep. No. 411, 83d Cong., 1st Sess. 14 (1953).....22

S. Rep. No. 416, 94th Cong., 1st Sess. 36 (1975).....23

S. 1830, 91st Cong., 1st Sess. (1969).....31

**Other Authorities:**

Supreme Court Rule 36.4.....1

F. Cohen, Handbook of Federal Indian Law, 152-80, 810-18 (1982 ed.).....42

Bureau of Land Management, Diapir Field Final EIS, OCS Proposed Oil and Gas Lease Sale 71 (May 1982)

at E-17, 136.....8

Aboriginal Fishing Rights in Alaska, 57 Int. Dec. 461 (1942).....20

Exec. Proc. 5030, 48 Fed. Reg. 10605 (March 10, 1983).....24

## INTEREST OF AMICI CURIAE

Amici are organizations which represent, in overlapping capacities, Alaska Natives who reside in the coastal regions of rural Alaska. The North Slope Borough is a political subdivision of the State of Alaska. Pursuant to Supreme Court Rule 36.4, the consent of the parties for the filing of this brief is not required. The North Slope Borough is the northernmost regional municipality in the United States, comprising 88,231 square miles adjacent to the Arctic Ocean. The great majority of the population of the Borough (84% according to 1980 U.S. Census data) are Natives and are dependent upon the sea ice regions off the Alaskan coast for their subsistence.

The Inupiat Community of the Arctic Slope (ICAS) is a regional tribal organization organized under the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq.,

and represents the Native Eskimo people of an area roughly coextensive with the North Slope Borough.

Ukpeagvik Inupiat Corporation (UIC) is the Native village corporation organized under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 et seq., for Barrow, Alaska.

Amici, in a variety of forums, have consistently stressed the necessity of protecting subsistence activities in the face of pressure for continued oil development in sea-ice areas. Amici ICAS and UIC, in a case consolidated for oral argument in the Ninth Circuit with Village of Gambell v. Clark, 746 F.2d 572 (9th

Cir. 1984) (Gambell I), claimed that the Inupiat people retain aboriginal title in sea-ice areas beyond the legal boundaries of the State of Alaska, because the extinguishment provisions of ANCSA, 43 U.S.C. § 1603, only purported to extinguish such rights "in Alaska." Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984). The Gambell I plaintiffs took a different approach -- they argued that "in Alaska" should be construed consistently in ANCSA and in the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101 et seq. The Court of Appeals in Gambell I recognized that "the two statutory provisions are clearly related," 746 F.2d at 580, but construed "in Alaska" in each to include the broad geographical region of Alaska, including the OCS and its superjacent waters. Id. at 575. Therefore, in the sea-ice areas beyond

the State's 3-mile limit, the Court of Appeals applied both ANCSA's extinguishment provisions and ANILCA's subsistence protections. ICAS and UIC's petition for certiorari was denied, 106 S. Ct. 68 (1985), and ICAS v. United States came to an end.

Now, however, the Petitioners argue that ANILCA does not apply to the OCS region (although they are presumably satisfied with the Court of Appeals' holding in Gambell I that ANCSA does apply there). Amici wish to remind the Court that the interpretations of ANILCA and ANCSA are inextricably intertwined. If ANILCA does not apply to areas not specifically "in Alaska," then ANCSA does not either, and the Native people retain aboriginal rights there. If so, Petitioners should be precluded from continuing their development activities in the OCS to the extent that such activities

interfere or impinge upon those aboriginal rights, unless and until the Natives consent to those activities, or until aboriginal rights in the area are properly and lawfully extinguished. Neither of these conditions has been satisfied, and Petitioners' development activities are properly subject to injunction.

If this Court holds that neither ANCSA nor ANILCA applies in areas not legally "in Alaska," it should remand this case to the Court of Appeals for a determination of whether other legal theories preclude aboriginal rights in the case ar a, or to the District Court to provide to the Respondents the opportunity to prove, as a factual matter, their use and occupancy of the areas in dispute.

## SUMMARY OF ARGUMENT

For centuries the Native people of Alaska have made continuous, extensive and exclusive use of vast areas of rural

Alaska and adjacent marine areas. Their occupancy of territory outside the State of Alaska, but subject to United States jurisdiction and control, gives rise to aboriginal rights under federal law which have never been extinguished. The Village of Gambell plaintiffs initiated this action to prevent outside oil developers from interfering with their occupancy of sea and sea-ice areas which had long served as their hunting and fishing grounds. Such interference both violates their aboriginal rights and threatens the destruction of the Eskimos as a people.

The Court of Appeals in Gambell I acknowledged as unique and undisputed the factual basis for the Natives' claim:

> Factually, no aboriginal group has ever used water and ice as intensely as have the Eskimos. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, and during this period the Eskimos treat the ice as a mere extension of the land. They set up

> camps on the ice. They build roads on it. And, most importantly, they hunt and fish on it. . . . Eskimos have relied on the sea to provide them with most of their necessities. They have relied on the oceans to provide them with food, clothing, fuel, and the basic material for making hunting equipment such as kayaks and harpoons . . . .
>
> Because ice areas are not physically different from land during long periods of the year, and because Eskimos have generally relied on the oceans for most of their food, fuel, and clothing, they have not traditionally recognized sharp distinctions between land and water. Simply stated, the sea is so central to the life of an Eskimo that s/he recognizes no distinctions between the two.

Gambell I at 576. The Eskimo occupation of the sea-ice and the rights which flow therefrom are not based on a technical or fictitious presence of any sort.

The threat to Eskimo survival from OCS development has steadily increased. There have been two major 5-year OCS leasing schedules since 1980 contemplating at least eleven major federal lease sales off northern and western Alaska.

An EIS relating to just one sale admits that "[d]isturbance of key species and use areas which the villages of Barrow, Nuiqsut and Kaktovik use for subsistence is very likely." The EIS authors expected that that sale "could have severe effects on the viability of the Inupiat people over time," and could jeopardize the "continued existence" of the bowhead whale, upon which they depend.[1] Thus, the amici are concerned not for abstract legal rights but for their continued physical existence.

The Court of Appeals in Gambell I recognized that ANCSA and ANILCA are related statutes and determined that both the extinguishment provision of ANCSA, 43 U.S.C. § 1603(b), and the subsistence provisions of ANILCA, including 16 U.S.C.

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[1] Bureau of Land Management, Diapir Field Final EIS, OCS Proposed Oil and Gas Lease Sale 71 (May 1982) at E-17, 136.

§ 3120(a), apply not only within the legal boundaries of the State of Alaska but in the entire geographic vicinity, including the OCS and its superjacent sea-ice and waters. Although Petitioners now challenge the applicability of ANILCA to the OCS, amici believe that the related decision to construe ANCSA to apply outside the State's borders is more clearly in error. In reaching the conclusion that ANCSA extinguishes aboriginal rights outside Alaska, the Court of Appeals failed to heed this Court's repeated admonitions that a Native people's aboriginal rights are secured by Federal law. And, it refused to apply the rules of construction that this Court has held must be applied to a statute affecting Native rights.

The Ninth Circuit's in-Alaska-means-outside-Alaska holding is all the more incredible in light of history of Gambell

I. On a motion for a preliminary injunction, Judge Fitzgerald found that the Native plaintiffs did not have a strong likelihood of success in establishing that "public lands in Alaska" included areas outside Alaska. Order (March 14, 1983) at 7. On motions for summary judgment, Judge von der Heydt ruled that "in Alaska" was limited to areas within State boundaries, and rejected plaintiffs' efforts to "manufacture an ambiguity":

> To determine the meaning of "public lands" the court need merely look to the definitional section of Title I of ANILCA. . . . Public lands means "land situated in Alaska" to which the United States holds title. . . . The court believes the plain meaning of this phrase is clear and rejects plaintiffs' attempts to manufacture an ambiguity. The court has also reviewed the legislative history and further concludes there is no persuasive evidence that Congress intended the phrase "public lands", as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska. It is significant to the court that Congress did not mention the Outer Continental Shelf in

> deliberations concerning both § 102(3) and § 810(a).

Memorandum and Order (April 4, 1983) at 2. Counsel for the federal and oil company defendants conceded, in briefs and oral argument to the Court of Appeals, that "in Alaska" has a clear meaning, and that the OCS is not "in Alaska."[2]

Thus, when the Court of Appeals held that, by extinguishing aboriginal rights "in Alaska," Congress also extinguished the Natives' aboriginal rights outside Alaska, it overrode the concessions of the parties and the rulings of both of the District Judges for the District of Alaska. Its holding sends a green light to other courts to construe sua sponte statutes that, like ANCSA, terminate some

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[2] See, e.g., Opposition of Appellees ARCO Alaska, Inc., et al., to Plaintiffs' Emergency Motion for Injunction Pending Appeal, at 35 (April 20, 1983); see also ICAS v. United States, 746 F.2d 570 (1984), Brief of Federal Appellees at 34 n.22 (April 1983).

Native rights, in overly broad and unintended ways.

**ARGUMENT**

In reviewing the geographic scope of ANILCA, this Court should reverse the Court of Appeals' holding in Gambell I regarding the geographic scope of ANCSA for the following reasons:

1. This Court has always protected Indian title and aboriginal rights from encroachment by governmental or private parties. The failure of the Court of Appeals to uphold Native rights in areas where the United States has extended its jurisdiction and control is inconsistent with this Court's rulings and sets dangerous new precedents. The consequences here are especially significant: This case does not involve ancient claims by the distant descendants of an Indian tribe long since assimilated into American life, but the present-day rights of

an aboriginal people that, to this day, depend upon aboriginal subsistence activities in some of the most isolated areas of North America.

2. This Court has always held that Native rights are not to be abrogated by implication and that statutes dealing with Indian rights must therefore be explicit as to any such abrogation. In defiance of this, the Court of Appeals held that ANCSA impliedly abrogates Native rights by interpreting the term "in Alaska" to mean, in effect, "outside Alaska." This departure from settled rules of decision in cases involving Native rights threatens Native rights nationwide and leads to absurd results.

A. The Gambell I Opinion Establishes a Novel and Erroneous Departure from the Law of Aboriginal Rights, Violating Principles That Have Been Established for Two Centuries.

In attempting to deal with the Eskimos' compelling factual situation, the Court of Appeals enunciated a new principle of the law of aboriginal rights; it held that a statute extinguishing rights in one location should be read to extinguish rights in another. This proposition is manifestly erroneous, and requires the misconstruction or contradiction of decisions of this Court spanning two centuries, which have shown a commitment to protecting aboriginal rights even in extraordinary circumstances.

From Chief Justice Marshall's observation in 1832, that the protection of aboriginal occupancy rights is "evidenced by our history, in every change through

which we have passed," Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832), to the Court's reminder in March of 1985 that the "Indians' right of occupancy is 'as sacred as the fee simple of the whites,'" County of Oneida v. Oneida Indian Nation, 470 U.S. ___, 84 L. Ed. 2d 169, 179 (1985) (Oneida II), this Court has insisted that aboriginal rights be respected as American jurisdiction is extended to new areas:

> From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites." This principle has been reaffirmed consistently. Thus, as we concluded in Oneida I, "the possessory right claimed [by the Oneidas] is a federal right to the lands at issue in this case."

Id. (citations omitted; emphasis in original).

In this context, the Court has stated that its decisions "emphasize 'Congress' unique obligation toward the Indians.'" Id. at 191; Morton v. Mancari, 417 U.S. 535, 555 (1974). In Oneida II, the Court held that the tribal rights at stake were valid and enforceable notwithstanding a 175-year delay in the commencement of a lawsuit to secure the tribe's claim. Irrespective of the unusual facts of that case, and the potentially dramatic consequences it raised for land titles in New York State, the Court could find no relevant legal basis for holding the Oneidas' claims barred.

Here, the unusual setting of the Eskimos' aboriginal domain has led the lower courts to repudiate aboriginal rights without any bona fide legal basis for doing so. The Court of Appeals' holding that such rights can be extinguished by implication is a frontal

assault on the doctrine of aboriginal rights, and is totally without merit.

B. Aboriginal Rights Are Cognizable in Sea-Ice Areas.

The Court of Appeals assumed rather than decided that plaintiffs had aboriginal rights in the sea-ice areas above the Norton Sound lease-sale area. Gambell I at 573 n.1. Native rights in sea-ice area far from shore are, as shown below, a matter of factual proof. They are not fundamentally unusual as a matter of law.

The nature and scope of Native aboriginal rights is governed by several well-defined principles, which have been established since "the time of the Revolutionary War." Oneida II at 178. First and foremost, aboriginal rights do not arise form treaties or statutes, but from the provable facts of aboriginal use and occupancy. United States v. Santa Fe

Pacific R.R. Co., 314 U.S. 339, 345 (1941); Kramer v. United States, 261 U.S. 219, 229 (1923). The Court has emphasized that the Native use and occupancy entitled to legal protection is to be determined with reference to the way of life, habits, customs and usages of the Natives, and not by Anglo-American property concepts. Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835).

As a result, aboriginal rights have been recognized or acknowledged, by treaty or otherwise, both with respect to inland waters[3] and in ocean waters[4].

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[3] Worcester v. Georgia, 31 U.S. (6 Pet. 515 (1832); Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487 (1964); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), remanded on other grounds, 623 F.2d 448 (6th Cir. 1980), decree modified, 653 F.2d 277 (6th Cir. 1981).

[4] Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962); Washington v. Washington State Commercial Passenger Fishing Vessel

Congress has also repeatedly acknowledged its duty to protect Native rights in ocean areas in a variety of contexts. See, e.g., Marine Mammal Protection Act, 16 U.S.C. §§ 1367-1407; Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801-82; Endangered Species Act, 16 U.S.C. §§ 1531-42.

Recognition of fundamental Native rights and interests in offshore areas, including rights secured by treaty, continues to be the acknowledged policy of the United States. See, for example, Treaty with Canada Concerning Pacific Salmon, done Jan. 28, 1985, T.I.A.S. No.___, art. XI; Pacific Salmon Treaty Act of 1985, Pub. L. No. 99-5, 99 Stat. 7 §§ 2(H), 3(a), 3(c)(4), 3(e)(3) and 4(b). See also Kaiser Aetna v. United States, 444 U.S. 164 (1979); Carter v. Hawaii,

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Ass'n, 443 U.S. 658 (1979).

200 U.S. 255 (1906); Damon v. Hawaii, 194 U.S. 154 (1904), in which the Supreme Court upheld extensive private rights in ocean waters and navigable ponds despite the absence of such rights at common law. Carter and Damon, in particular, were heavily relied upon by the Interior Solicitor in his decision in Aboriginal Fishing Rights in Alaska, 57 Int. Dec. 461 (1942), in which he held that the extent of Native rights in offshore areas had to be determined with reference to the facts of Native use and occupancy.

Aboriginal rights as a doctrine presumes federal paramountcy, and aboriginal rights in an area become secured under federal law when federal jurisdiction extends to cover territory occupied by Natives.

Congress has acted consistently with this understanding, even when extending federal jurisdiction into marine areas.

In 1953, it enacted the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 et seq., and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 et seq. The latter asserted federal jurisdiction and control over submerged lands beyond state boundaries. A House Report makes it clear that Congress did not believe that the federal government's paramount powers under United States v. California, 332 U.S. 19 (1947), and its progeny by themselves defeated valid pre-existing rights.

> OCSLA asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the land and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires as a matter of policy and law, that the property rights of individuals in

> and to such lands and resources be recognized and confirmed.

H. Rep. No. 215, 83d Cong. 1st Sess., reprinted in U.S. Code Cong. & Ad. News 1385, 1441 (1953) (emphasis added).[5]

In 1976, Congress enacted the Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801 et. seq. That Act extended United States jurisdiction to regulate marine fisheries from the existing territorial sea to 200 miles from the

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[5] Both SLA and OCSLA contain savings clauses which provide that: "Nothing herein contained shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this [Act] . . . . " 43 U.S.C. §§ 1315, 1342. The Senate Report on SLA explained that this savings clause "follows the historic Congressional practice of exempting form the operation of statutes of this character existing third party rights, if any there be." S. Rep. No. 133, 83d Cong., 1st Sess. 21 (1953). Similarly, the Senate Report for OCSLA stated: "Section 14 is a 'Savings Clause," in that it protects any rights in the Outer Shelf area that may have been acquired prior to the effective date of the Act." S. Rep. No. 411, 83d Cong., 1st Sess. 14 (1953).

coastline. The Senate Commerce Committee emphasized that the Act should not be construed to affect the fishing rights of Native Americans, whether established by treaty or any other law. S. Rep. No. 416, 94th Cong., 1st Sess. 36 (1975). Again, such Congressional action cannot be squared with the proposition that Native rights are abrogated by the mere extension of United States sovereignty into ocean areas. Instead, as we have observed, the real significance of these statutes is that they trigger the federal government's duty to protect pre-existing Native rights in those areas. See Passenger Fishing Vessel, supra, 443 U.S. at 668.

There is no reason to create a brick wall at the ocean's edge, beyond which basic principles of American law, recognized since the Revolutionary War, cannot apply. As this Nation increasingly as-

serts its sovereignty in ocean areas[6], it is imperative that the fundamental protections accorded to and required by Natives by the federal doctrine of aboriginal rights continue in force.

C. The Court of Appeals' Opinion Authorizes Broad and Unprincipled Extensions of Statutes Abrogating Indian Rights and Is Inconsistent with the Opinions of This Court.

The rule in Indian law is that ambiguities in statutes are to be construed in favor of the Indians. This canon has been said to be "eminently sound and vital," Bryan v. Itasca County, 426 U.S. 649, 655 n.7 (1976), and has been consistently reaffirmed:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the

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[6] See, e.g., Exec. Proc. 5030, 48 Fed. Reg. 10605 (March 10, 1983), proclaiming a 200-mile Exclusive Economic Zone in which the United States has extensive sovereign rights and jurisdiction.

> Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. "Absent explicit statutory language," this Court accordingly has refused to find that Congress has abrogated Indian treaty rights.
>
> The Court has applied similar canons of construction in non-treaty matters. Most importantly, the Court has held that Congressional intent to extinguish Indian title must be "plain and unambiguous," and will not be "lightly implied." Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," the Court concluded that it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy."

Oneida II at 187 (citations omitted).

The Ninth Circuit's decision stands in blatant defiance of these principles. Here, the court began with a statute that, on its face, is clear and unambiguous: The extinguishment provisions of ANCSA apply "in Alaska," and nowhere else. There is no "plain and unambiguous" statement that aboriginal rights

outside Alaska are extinguished. Under the principles reaffirmed in Oneida II, that should have ended the matter.

The Ninth Circuit, however, combed the legislative history in order to "manufacture an ambiguity." Then, in analyzing that history, it ignored the repeated statements by congressmen, congressional committees, and key witnesses at congressional hearings, that the scope of the settlement was coextensive with the State of Alaska. Instead, it relied on an isolated comment by a private party in a 1969 hearing. On the basis of that comment, it held that Congress in 1971 extinguished aboriginal rights outside Alaska, despite the plain language of the statute.

This holding makes a mockery of this Court's decisions and invites other courts to cast aside settled rules of statutory construction whenever Congress

extinguishes some Indian rights. In that setting, the Ninth Circuit apparently believes it is free to expand the extinguishment provisions at will. This Court should correct that holding.

1. There Is No Ambiguity in ANCSA; By Creating One, the Court of Appeals Wreaks Havoc with Rules Defining State Boundaries, and Contravenes Basic Principles of Federal Law.

By its terms, § 4(b) of ANCSA only extinguishes aboriginal rights "in Alaska." 43 U.S.C. § 1603(b). The language in the statute, which extinguishes aboriginal title in submerged lands "both inland and offshore" is qualified by specific reference to areas "in Alaska."

The Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, § 2 (1958), provides that "[t]he State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the

Territory of Alaska." Under firmly established law, "territorial waters" comprise a three-mile belt adjoining the coastline. United States v. California, 332 U.S. 19, 33 (1947). Section 6(m) of the Statehood Act made applicable to Alaska the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., which limits the seaward boundary of Alaska to "a line three geographical miles distant from its coastline." 43 U.S.C. § 1312. Thus, by referring to areas "in Alaska," Congress referred to well-defined territory, known to comprise approximately 375 million acres.

When Congress has intended to legislate with respect to OCS areas outside state boundaries, it has done so expressly. For example, in the Energy Policy and Conservation Act, Congress stated that "[t]he term 'United States' when used in the geographical sense means all

of the States and the Outer Continental Shelf." 42 U.S.C. § 6202(5) (emphasis added). See id., § 6202(10). Conversely, in the many statutes in which it has legislated with respect to areas "in" a particular state, its intent clearly was to reach only to the boundaries of that state, and not to vast areas beyond. See, e.g., 43 U.S.C. § 391, establishing the Reclamation Fund with monies received from the sale of public lands "in . . . California, . . . Oregon [and] Washington," among other states. It has never been suggested, of course, that monies received from the sale of OCS lands bordering these states are subject to the provisions of § 391.

The term "in Alaska" is itself used in numerous sections of ANCSA in addition to § 4. That "in Alaska" means exactly what it says is most clear in 43 U.S.C. §§ 1610, 1611, 1616 and 1621 (and also

§ 6(b) of the Statehood Act), in which rights in "public lands in Alaska" are discussed.[7] These sections provide, among other things, for land withdrawals, exchanges, and selections "in Alaska" by the State and regional corporations. Obviously, it was not Congress' intention that the State and Native regional corporations might select, or acquire through exchange with the Secretary of the Interior, OCS lands outside state boundaries.

In short, there is no ambiguity here. By artificially creating one, the Ninth Circuit opinion wreaks havoc with statutes applicable "in" particular states, threatening to create absurd results. In the special context of Indian aboriginal rights, the court's

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[7] "Public lands" are defined, in 43 U.S.C. § 1602(e), as all Federal lands and interests therein located in Alaska," with limited exceptions.

manufactured ambiguity is squarely inconsistent with this Court's decisions safe-guarding such rights.

2. ANCSA's Legislative History Provides No Support for the Extraordinary Decision of the Court of Appeals.

S. 1830, 91st Cong., 1st Sess. (1969), a predecessor to ANCSA, provides direct evidence that Congress understood that the OCS is not "in Alaska." Section 12 of S. 1830 earmarked certain mineral revenues for Alaska Natives. Subsection 12(a)(1) addressed minerals "located in all public lands in Alaska." Subsection 12(c), separately addressed minerals "from the Outer Continental Shelf bordering the State of Alaska." In drafting and introducing this bill, the Administration and the Senate Committee on Interior and Insular Affairs demonstrated a clear understanding that the OCS is not "in Alaska."

Despite this the Court of Appeals reads "in Alaska" to include, in addition to the 375 million acres within Alaska, hundreds of millions of acres comprising the OCS outside Alaska.[8] It finds ambiguity in the phrase "in Alaska" on the basis of the definition of Norton Sound in Webster's New Geographical Dictionary and in the language and legislative history of ANILCA, which was enacted nine years after ANCSA. Gambell I at 575-76.

ANCSA's legislative history indicates that Congress was well aware that the geographic scope of the Act was coincident with the State. For example, the committee reports repeatedly characterize the subject of ANCSA as Native

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[8] In debates on ANILCA, the OCS bordering Alaska was stated to comprise from 203 to 300 million acres. See 124 Cong. Rec. S10, 106-07 (daily ed. June 29, 1979) (Sen. Stevens) (258.4 million acres), 125 Cong. Rec. 44 (1979) (Rep. Udall) (203 million acres); id. at 10,285 (Rep. Seiberling) (300 million acres).

claims "to the lands which now comprise the State of Alaska." Notably, this characterization is found in the Senate committee reports on bills containing extinguishment provisions that in all material respects are identical to those enacted,[9] and was repeated on the floor of the Senate by Senator Jackson, the Chairman of the Committee on Interior and Insular Affairs.[10] Furthermore, key congressmen repeatedly referred to the Native claims being extinguished as claims

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[9] See S. Rep. No. 91-925, 91st Cong., 2d Sess. 46, 47 (1970) ["1970 Senate Report"]; S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971), reprinted at 117 Cong. Rec. 38435, 38436 (1971). See also H.R. Rep. No. 92-523, 92d Cong., 1st Sess (1971), reprinted in [1971] U.S. Code Cong. & Ad. News 2192, 2241 ["1971 House Report"], in which Rep. John Saylor, the ranking minority member of the House Committee on Interior and Insular Affairs, stated that the Act settled claims "based on aboriginal use and occupancy of lands comprising the State of Alaska."

[10] 116 Cong. Rec. 24208 (1970); 117 Cong. Rec. at 38433 (1971).

covering "the State of Alaska," "375 million acres," or "land in the State"; none referred to claims covering, in addition, the vast ocean areas outside Alaska.[11]

Congress' intent to settle only Native claims within the State is consistent with the underlying purpose of the Act, which was to resolve the conflict under the Statehood Act between Native claims and State land selection rights. This was a conflict that, like the State-

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[11] See, e.g., Hearings Before the House Subcomm. on Indian Affairs on H.R. 3100, H.R. 7039, and H.R. 7432 (1971) ["1971 House Hearings"] at 65 (Rep. Aspinall, Chairman, House Comm. on Interior and Insular Affairs; "maximum of 375 million acres"); 340 (Rep. Begich, Alaska; "375 million acres"); and 370 (Harrison Loesch, Assistant Secretary of the Interior, "the entire State of Alaska"); 117 Cong. Rec. at 36854 (Rep. Aspinall; "375 million acres," "most of the State"), 36857 (Rep. Haley; "land in the State"); 38443 (Sen. Allot; "300 million acres"); and 38445 (Sen. Harris; "nearly all of the State's 375 million acres of land").

hood Act, pertained exclusively to areas within the State, and did not implicate ocean areas outside State boundaries.

The Senate Committee noted that the United States would not be the

> main beneficiary from clearing title to lands in Alaska . . . To the State of Alaska, a settlement would remove the cloud which the Native Claims cast on all land titles in Alaska . . . [State selections under the Statehood Act could then] proceed, free from the threat of litigation and conflicting claims.[12]

In contrast, nowhere in the voluminous legislative history is there the slightest suggestion that the federal government would benefit from ANCSA because of its interest in the OCS, although other federal benefits were noted.[13] The purpose of the Act was to resolve the conflicts created by Native claims within

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[12] 1971 Senate Report at 83, 86.

[13] See, e.g., 117 Cong. Rec. at 36469 (clearing federal title to land within the State).

the State, not to settle claims to vast areas outside Alaska.

The legislative history relied upon by the Court of Appeals fails to support its extraordinary expansion of the geographic scope of ANCSA. For its version of ANCSA's legislative history, the Court of Appeals relied largely on the statements in Congressional hearings by representatives of the Alaska Federation on Natives ["AFN"], the Western Oil and Gas Association ["WOGA"], the State of Alaska, and the National Wildlife Federation ["NWF"]. Gambell I at 578. It did not cite the statement of a single congressman or congressional committee indicating that ANCSA would be applied outside state boundaries. The consistent focus of the statements it did cite was the inclusion in ANCSA's extinguishment provisions of waters, submerged lands, and hunting and fishing rights within state boundaries,

not the extension of the Act to vast areas outside Alaska.

AFN representatives, for example, clearly understood the Act to apply only within the State. The following statements are illustrative:

> By its actions on these bills Congress will extinguish our valid land rights in approximately 375 million acres of land in Alaska . . . Fundamentally these bills are in many respects quite similar. All of them would extinguish our land rights throughout the State of Alaska.
>
> AFN believes a settlement extinguishing the property rights of the Natives to substantially the entire State of Alaska must recognize that different groups of Alaska Natives have property rights in different lands aboriginally used and occupied by them.
>
> We are not asking for anything. We are offering the U.S. Government 84 percent of our property. We are offering them 300 million acres to satisfy the needs of others in this State and to satisfy the needs of the United States in the way of

> Federal reserves, wildlife refuges, wilderness areas.[14]

Similarly, the State, in urging that the settlement extend to "lands, waters, and submerged areas in Alaska,"[15] gave no indication that it should encompass areas outside the state. Nor did NWF argue for a geographic enlargement of the Act. Even the WOGA statements are far from clear on this point. While its statements in the course of the 1969 hearings do contain passing references to the OCS, no such references are found in its subsequent statements.[16]

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[14] 1971 House Hearings at 181; Hearings Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971) ["1971 Senate Hearings"] at 353, 475 (emphasis added).

[15] Hearings Before the Senate Comm. on Interior and Insular Affairs on S. 1830, 91st Cong., 1st Sess. (1969) at 234.

[16] For example, with respect to H.R. 3100, which extinguished claims of "aboriginal title <u>in Alaska</u> . . . including any aboriginal hunting and fishing rights that may exist" and claims

The Court of Appeals also suggested that "Congress could not have been unaware of such widely known facts of Native Alaskan life," referring to Native use and occupancy of ocean areas far outside State boundaries. Gambell I at 576. Yet to document such facts, the panel turned to materials that were published after the enactment of ANCSA, such as the 1982 Norton Sound EIS. Id. at 576-77. The scant testimony it cites from the ANCSA hearings does not identify whether the areas being discussed were inside or

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"based on . . . use or occupancy of land or water areas in Alaska," WOGA said:

> The Declaration of Settlement contained in section 2 of H.R. 3100 is complete and comprehensive, and we have no changes to suggest in it. In particular, section 3 extinguishes claims to water, as well as land, which is needed because some of the claims are asserted for water areas.

1971 House Hearings at 2, 353.

outside the three-mile expanse of coastal waters.

Finally, the Court of Appeals observed that "the needs of Natives for subsistence hunting and fishing were considered in determining the amount of land granted the Natives . . . ; the land was granted, in part, 'in lieu of subsistence hunting and fishing rights' . . . . " Gambell I at 576. Yet it is clear that no provision in ANCSA -- including the Native land grants -- provides even the remotest protection for subsistence activities in the areas at issue in this case. The total absence of such protection simply confirms that these areas are not within the scope of ANCSA.[17]

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[17] Even in Alaska the allocation of land to the Eskimos was inadequate for subsistence purposes because it was done on the basis of population, not subsistence needs. Given the climate and geography of northern and western Alaska, hunters range more widely in pursuit of game than Natives from other regions.

Thus, on the basis of a passing reference by a private party in a 1969 hearing, the Court of Appeals held that, when it enacted ANCSA in 1971, Congress intended it to apply to millions of acres outside Alaska. This holding contradicts the legislative history and the clear understanding of virtually everyone involved.

3. The Court of Appeals' Resolution of Perceived Ambiguities Against the Natives Violates Fundamental Principles of Federal Indian Law.

The Court of Appeals' opinion states that "[t]he possibility of two meanings of the phrase "in Alaska" renders the provision ambiguous, justifying reference to the legislative history." Gambell I

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The Act's provision of comparatively small parcels to the Eskimos failed to recognize this. To now interpret ANCSA to extinguish rights outside Alaska exacerbates this disproportion between the territory granted to the Eskimos by ANCSA and the territory they need to survive.

at 575. While we believe that there is no such ambiguity, and that the court's legislative history analysis is incomplete and unfair, its most egregious error is its failure to acknowledge and apply the settled rule that ambiguities in statutes affecting Indians are to be construed in the Indians' favor. This departure from settled rules of decision in Indian cases sets a dangerous precedent of national significance.

The Ninth Circuit apparently believed that it could disregard these rules because ANCSA was intended to terminate some Native rights. But ANCSA is not alone in this respect. For example, commencing in 1954, Congress enacted a series of termination statutes, which abrogated certain rights of specified Indian tribes throughout the United States. See generally, F. Cohen, Handbook of Federal Indian Law, 152-80, 810-18 (1982

ed.). Even in construing these statutes, the Court adhered to the traditional rules of decision applicable in Indian cases. See, e.g., Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968) (termination of reservation held not to extinguish hunting and fishing rights). The Court of Appeals' approach to ANCSA -- that in construing a statute terminating some Native rights there is no need to adhere to settled rules of decision in Indian cases -- thus sets the wrong precedent for construing a significant number of existing and prospective federal statutes. See Oneida II at 191 (discussing eastern land claim settlement acts).

The danger of this approach is amply illustrated by the decision in this case. If, in the light of uniform indications in the legislative history that Congress understood it was legislating with

respect to the State of Alaska, the phrase "in Alaska" can be "construed" to mean "in or out of Alaska," then the pledge to "respect the Indian right of occupancy," Oneida II at 187, has been reduced to an empty and cynical gesture.

The Ninth Circuit itself has held that statutes passed for the benefit of Indians "'must be interpreted as [the Indians] would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor.'" Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1257 n.6 (9th Cir. 1983), quoting Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).[18]

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[18] In United States v. Atlantic Richfield Company, 612 F.2d 1132, 1139 (9th Cir. 1980), the Court of Appeals held that this principle "operates with less force" because the Natives were represented by "such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark." In fact, however, during the hearings on the Act, the Eskimos were

Statements in ANCSA's legislative history to the effect that the extinguishment of aboriginal rights should be construed broadly, Gambell I at 575 n.3, do not obviate this principle; those statements hardly can be said to authorize a court to enlarge the geographic scope of the Act.

The principle is particularly important here, since ANCSA was politically dependent upon acceptance by Natives for its enactment. One of the basic parameters of such acceptance was that the Act was applicable within the State. The Native arguments on compensation were

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largely represented by the Arctic Slope Native Association (ASNA), not by the Alaska Federation of Natives, Justice Goldberg, or Attorney General Clark. Indeed, ASNA took positions at odds with those taken by AFN, never accepted the Settlement Act, and ultimately urged President Nixon by telegram to veto it. See 1971 House Hearings at 296-314. In any event, the issue is what the Natives understood the statute to mean, not what their lawyers may have believed.

consistently based on the scope of the claims they were relinquishing, and those claims were consistently characterized as comprising areas within the State. For example, an Inupiat representative testified:

> [A]nything less than 60 million acres for the entire statewide settlement is an act of dishonor. That amount of land is about 16 percent of the total State. It seems to us that when the United States takes our land, the retention of anything less than 16 percent certainly qualifies as an act of dishonor.[19]

To judicially extend ANCSA to vast ocean areas outside the State, 13 years after its enactment, is indefensible. It is precisely this kind of "construction" that the principle that doubtful expressions be resolved in the Indians' favor was designed to avoid.

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[19] 1971 House Hearings at 246 (statement of Joseph Upicksoun, President, Arctic Slope Native Association).

## CONCLUSION

Any examination of the geographic scope of ANILCA must include the interrelated issue of the geographic scope of ANCSA. The Court should reverse the Court of Appeals' holding on the geographic scope of ANCSA's extinguishment and remand this case for further proceedings.

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Respectfully submitted,

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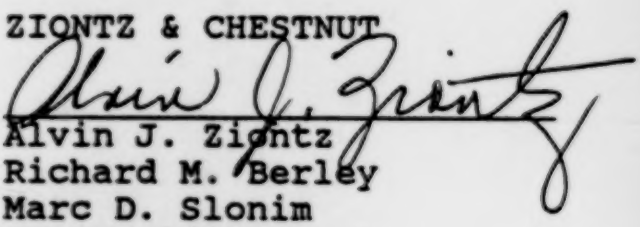

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